RECENT CASES.

ADMIRALTY — TORTS — TEST OF JURISDICTION. — *Held*, that admiralty has jurisdiction of damage by a faulty vessel to a beacon light solidly attached to the bottom of the sea. *United States* v. *Evans*, 25 Sup. Ct. Rep. 46. See *Notes*, p. 299.

AGENCY — RIGHTS OF AGENT AGAINST PRINCIPAL — BROKER'S RIGHT TO COMMISSIONS. — The defendant agreed to pay the plaintiff a commission for effecting a sale or exchange of his property. The latter secured a purchaser who entered into a contract with the defendant for an exchange of land. In a suit for his commission, the plaintiff did not prove that the purchaser had title to the land to be exchanged nor that he was financially responsible. *Held*, that a judgment for the plaintiff should be reversed. *Snyder* v. *Fidler*, 101 N. W. Rep. 130 (Ia.).

It is clear that, before a contract has been consummated between the purchaser and the principal, the broker is not entitled to his commissions unless he has procured a purchaser who is willing and able to perform. *Sayre* v. *Wilson*, 86 Ala. 151. But if the principal has entered into a contract with the purchaser, some courts have held that the inability of the latter to perform is immaterial. *Roche* v. *Smith*, 176 Mass. 595; *contra*, *Jenkins* v. *Hollingsworth & Tabor*, 83 Ill. App. 139. In favor of this view, it is argued that by entering into a contract with the purchaser, the principal has relieved the broker of further duty. But by a fair construction of the agreement, the principal intends to pay only when a purchaser who is able to perform his promise is procured; and as the broker has not performed this condition precedent, it would seem that he is not entitled to recover. Furthermore, since the principal does not know of the purchaser's inability to perform, he can hardly be said to have waived his right to insist upon this requisite before paying the commission. See *Wiley* v. *Athol*, 150 Mass. 426, 435.

AGENCY — RIGHTS OF PRINCIPAL AGAINST AGENT — PRINCIPAL'S RIGHT TO AGENT'S ILLEGAL PROFITS. — An agent, having obtained a loan for his principal on certain debentures, was promised a commission by the creditor company, on the premiums which should become payable to it. *Held*, that the agent cannot be charged as trustee of money so received, though he does become liable for it in account. *Powell & Thomas* v. *Evan Jones & Co.*, 21 T. L. R. 55 (Eng., C. A.).

This decision follows the well settled law of England. *Lister & Co.* v. *Stubbs*, L. R. 45 Ch. D. 1. The general rule of law not only forbids an agent, as such, to make any personal gain at the expense of his employer, but to make any collateral gain at all, lest he be tempted, in doubtful cases, to subordinate his principal's interests to his own. The case under discussion is hard to reconcile with this principle; for the temptation to take illegal commissions will not be removed, even by the certainty that the original sum must be disgorged, provided the agent may retain the profits of speculation. But the position of the court seems to be sustained by authority; for America remains silent on the point, while England has repeatedly refused to hold the agent as trustee save when he misuses funds actually coming from the principal. See *Taylor* v. *Plumer*, 3 M. & S. 562.

BANKRUPTCY — PROVABLE CLAIMS — TORT CLAIM ARISING FROM FRAUD. — The defendants converted stock which they had purchased for the plaintiff. The latter sued for fraudulent conversion, and the defendants pleaded that the plaintiff's claim was provable and barred by their discharge in bankruptcy. § 63 a (4) of the Bankruptcy Act provides that debts founded upon a contract express or implied are provable, and § 17 excepts from the operation of a discharge judgments in actions for fraud, and debts created by the fraud of a fiduciary. *Held*, that under these two sections the plaintiff's claim is provable and discharged, although he elects to sue in tort instead of in contract. *Crawford* v. *Burke*, 25 Sup. Ct. Rep. 9.

Under former bankruptcy acts, the provability of claims suable either in tort or contract, was determined by the holder's election to sue in contract, as tort claims were not provable. *Williamson* v. *Dickens*, 5 Ired. (N. C.) 259. Under the present act the Supreme Court takes the view that claims for fraud, except those reduced to judgment or against a fiduciary, must be provable by implication, else these exceptions are meaningless. But a sufficient reason why judgments on claims for fraud had to be

expressly excluded to prevent their discharge is that, in general, judgments for torts are provable. COLLIER, BANKRUPTCY, 4th ed., 442. And claims against a fraudulent fiduciary are evidently excepted so that even where the action is brought in contract, it will not be discharged. *Frey* v. *Torrey*, 70 N. Y. App. Div. 166. Because certain debts are explicitly excluded, it does not follow that they would otherwise be discharged, or that other claims not mentioned are so affected, as certain claims may be mentioned merely to remove all doubt. Thus the Amendment of 1903 expressly excludes claims for alimony, although these were previously neither provable nor discharged. 32 Stat. at L. 797, § 5; *Audubon* v. *Shufeldt*, 181 U. S. 575. Therefore § 17 would seem to raise no implication that tort claims for fraud are provable.

BANKS AND BANKING — BANKERS' LIEN — REQUIREMENT OF NOTICE. — A bank applied funds deposited with it in extinguishment of a debt owed it by the depositor, and, without having notified him of that application, refused to pay a check drawn by him in favor of a third party. *Held*, that the bank is liable to the depositor for the resulting damages. *Callahan* v. *Bank of Anderson*, 48 S. E. Rep. 293 (S. C.).

According to the great weight of authority, a bank to which one of its depositors is indebted may apply upon the debt funds deposited by him. *Bank* v. *Brewing Co.*, 50 Oh. St. 151. No other case has been found, however, in which this right has been held to depend upon the receipt by the depositor of notice of the bank's intention to exercise it. It would seem that in the principal case the court has disregarded entirely the considerations that have weighed with other courts in deciding similar cases. The right of a bank to pay itself out of deposits made by its debtor is ordinarily rested upon the so-called bankers' lien. *Hayden* v. *Alton National Bank*, 29 Ill. App. 458. By what is perhaps the more logical theory, it is based upon the right of the bank to offset its claim against that of the depositor. *Clark* v. *Northampton National Bank*, 160 Mass. 26. In the adoption of either view there seems to be no occasion for the application of any doctrine of required notice.

BANKS AND BANKING — COLLECTIONS — LIABILITY OF DEPOSITARY BANK. — The plaintiff deposited with the defendant bank a draft for collection. The defendant bank forwarded it to its correspondent, directing the latter to remit the proceeds by New York exchange. After collection but before remittance, the correspondent bank failed. *Held*, that the plaintiff may not recover. *Holder* v. *Western, etc., Bank*, 132 Fed. Rep. 187 (Circ. Ct., S. D. Oh.). See NOTES, p. 300.

BILLS AND NOTES — NEGOTIABILITY — POWER TO RESTRICT ASSIGNMENT. — *Semble*, that where the maker of a note writes the words "non-negotiable" and "non-transferable" on its face, its assignability is not affected, though it is rendered non-negotiable. *Herrick* v. *Edwards*, 81 S. W. Rep. 466 (Mo., Ct. App.). See NOTES, p. 306.

BILLS OF LADING — HOLDER AS OWNER OF GOODS. — *Held*, that one who takes a bill of lading in his own name as security for advances is not a mortgagee or pledgee within Mass. Pub. St. 1882, c. 157, § 28. *Semble*, that he is absolute owner of the goods. *Moors* v. *Drury*, 71 N. E. Rep. 810 (Mass.). See NOTES, p. 307.

CHARITIES AND TRUSTS FOR CHARITABLE USES — CREATION AND ENFORCEMENT OF CHARITABLE TRUSTS — CONTROL OF PROPERTY ON DIVISION OF CHURCH-MEMBERSHIP. — Through a schism, the Free Church of Scotland was divided into two factions. A great majority of the clergy and congregation rejected the distinguishing principles of their belief, coalesced with another denomination, and were allowed by the trustees to enjoy the entire property of the discordant church. A small minority claimed that the church property should be used only for the promotion of those doctrines which obtained at the time of its acquisition, and brought action for breach of trust. *Held*, that the faction which adheres to the original principles of the church is entitled to the enjoyment of all the property. *General Assembly of the Free Church of Scotland* v. *Lord Overtoun*, [1904] App. Cas. 515.

The chief difficulty in this class of cases is to determine what really constitutes a departure from the essential beliefs of the church. Property donated to a religious organization is presumed to be for the promulgation of its characteristic doctrines. *Hale* v. *Everett*, 53 N. H. 9. If this be true, those in control should be restrained from applying it to the promotion of other beliefs. *Attorney-General* v. *Pearson*, 3 Mer. 353. This is simply an application of the familiar rule that trustees have no right to change the object endowed. *Park* v. *Chaplin*, 96 Ia. 55. It follows, therefore, that the right to the church property of a divided congregation belongs to that faction which retains those distinguishing doctrines held when the trust was declared. *App* v. *Lutheran Congregation*, 6 Barr (Pa.) 201. Otherwise a great injustice would be done,

not only to the creator of the trust, but also to those who still adhered to the original ideals and beliefs upon which the sect was founded. On principle, however, it would seem more in accordance with liberal development to allow a church to change its faith without thereby losing its property. And this end would be attained if bequests were construed as given to religious corporations as such, rather than for the furtherance of their peculiar tenets. See 10 HARV. L. REV. 184.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — SEPARATE DOMICILE OF WIFE. — A divorce statute required the plaintiff's residence in the state for six months. A wife, after a *bona fide* residence for that period, sought a divorce. Her husband, domiciled abroad, successfully defended her suit and sought a divorce on a cross-bill. *Held*, that the court has jurisdiction. *Pine* v. *Pine*, 100 N. W. Rep. 938 (Neb.).

Unless the wife is domiciled in the state, the court has no jurisdiction, for the mere appearance of the parties is insufficient. *Andrews* v. *Andrews*, 188 U. S. 14. Generally in this country a wife's separate domicile is not restricted to cases of divorce for good cause. *Hopkins* v. *Hopkins*, 35 N. H. 474. As an original question this seems wrong, since the domicile of the wife depends on her obligation to live with her husband. See *Hunt* v. *Hunt*, 72 N. Y. 217, 243. On the same principle a domicile allowed by statute when she is still under the obligation should have no extra-territorial validity. *Contra*, *Johnson* v. *Johnson*, 57 Kan. 343 (*semble*). But just as this reason ceases when the wife has a valid cause for divorce, so when she gives the husband good cause, the obligation to live with him depends on his will; and if he chooses to terminate the obligation by divorce he thereby ceases to control her domicile. *Watkins* v. *Watkins*, 135 Mass. 83. On that basis the wife was properly held domiciled in Nebraska. As a matter of conflict of laws that gives the court jurisdiction to grant the husband a divorce. *Ibid.* That this was not excluded by the local statute was the main point in the court's opinion, and seems correct. *Cf. Sterl* v. *Sterl*, 2 Ill. App. 223.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — POSTPONEMENT OF TRIALS. — A statute provided that where a cause was entitled to a preference the court, upon application, "must designate a date during that term on which day the said cause shall then be heard." From an order granting a preference and fixing the trial for a day certain, the defendant appealed. *Held*, that the statute is unconstitutional as tending to deprive a party of life, liberty, or property without due process of law. *Riglander* v. *Star Co.*, 98 N. Y. App. Div. 101.

This decision is interesting as a novel illustration of the operation of the constitutional guaranty. The Supreme Court has held that the meaning of the phrase "due process of law," which, because of its generality, is difficult to define, must be determined ultimately by a process of inclusion and exclusion of individual cases. *Davidson* v. *New Orleans*, 96 U. S. 97. Probably the most common statement makes it synonymous with a course of proceedings based upon established rules. See *Pennoyer* v. *Neff*, 95 U. S. 714. It is clear, however, that it at least guarantees the parties to a suit the right of notice and a fair opportunity to be heard. *Stuart* v. *Palmer*, 74 N. Y. 183. Where the continuance of a case is desirable because of the inability of the plaintiff or the defendant to procure his witnesses or prepare his case adequately, it must seriously interfere with the right to a hearing if the postponement be denied. By a well established general practice courts grant such postponement at their discretion. *Ogden* v. *Gibbons*, 5 N. J. Law 611. Consequently, a statute arbitrarily prohibiting the exercise of such discretion seems properly held unconstitutional.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS. — A New York statute provided that each contract made by the state or a municipality with a contractor should contain a stipulation that he should not employ laborers for more than eight hours a day, the contract to be void if he did not fulfil the stipulation. *Held*, that the statute is unconstitutional because it violates the rights and powers of a municipality. *People ex rel. Cossey* v. *Grout*, 179 N. Y. 417.

For a discussion of the principles involved, see 17 HARV. L. REV. 50.

CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — PARENT'S DEFAULT A DEFENSE IN ACTION BY CHILD. — An action was brought by the father, as administrator of the estate of his two-year-old child, to recover damages for the child's death caused by the defendant's negligence. The father was the sole beneficiary of the child's estate. *Held*, that the contributory negligence of the father is a good defense to the suit. *Davis* v. *Seaboard, etc., Ry*, 48 S. E. Rep. 591 (N. C.).

In an action for negligently causing a child's death, the father's contributory negligence is a defense if the suit is brought by him for the loss of his child's services.

Bellefontaine Ry. Co. v. *Snyder*, 24 Oh. St. 670. In applying the same rule to suits in the child's name, where the father is the sole beneficiary, the court takes the better side of a question upon which there is a conflict of authority. *Bamberger* v. *Citizens', etc., Co.*, 95 Tenn. 18; *contra*, *Wymore* v. *Mahaska*, 78 Ia. 396. The result is reached, not by resorting to the fiction of imputed negligence, but by recognizing that the father is the real party interested in the suit, and by treating the case as if he were the plaintiff. As is stated by the court, this proceeding finds its justification in the fact that any other would result in permitting the wrongdoer to derive profit from his own wrong. As a matter of strict principle, the recognition of the real, rather than the ostensible plaintiff can hardly be supported; but the justice of the result seems to warrant the court in disregarding this purely technical objection.

CORPORATIONS — DIRECTORS — DIRECTOR LOANING TO THE CORPORATION. — Two directors of a corporation made a loan of money to it in the name of a third party without disclosing to the other directors that they were the real parties in interest. The third party then assigned the note given by the corporation and the mortgage made to secure it to the two directors, who brought suit to recover the face value of the note without interest and to foreclose the mortgage. *Held*, that the note is valid and the directors may recover. *Schnittger* v. *Old Home, etc., Co.*, 78 Pac. Rep. 9 (Cal.).

It is well settled that a director may loan money on mortgage security to a corporation, though such a loan will be subjected to a strict scrutiny by the courts to prevent any over-reaching. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587. As a fiduciary the director should, at least, be required to disclose the fact that he is the party making the loan, for the corporation might not care to borrow from its directors. It might be argued, therefore, that for their silence in the present case, these directors should not be allowed to recover on the note, but only in quasi-contract. But according to the weight of authority, a director may purchase a debt due from the corporation, though he may not collect thereon more than the sum paid for it. *Bonney* v. *Tilley*, 109 Cal. 346. In the present case the practical effect of the transaction was the purchase of a debt due the third party in whose name the loan was made; and since the decision allowing recovery merely of the face value of the note gives the plaintiff no profit upon his unconscionable dealing, it may be supported.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — *Held*, that where, in a prosecution for homicide, the defendant's sanity is in issue, the burden is on him to prove insanity by a preponderance of evidence. *State* v. *Quigley*, 58 Atl. Rep. 905 (R. I.); *State* v. *Clark*, 76 Pac. Rep. 98 (Wash.).

In a recent Delaware case the jury were instructed that insanity being matter of defense, it must be proved as a fact by the defendant to the satisfaction of the jury; but if, upon the whole evidence, they entertained a reasonable doubt of the defendant's guilt, such doubt should inure to his acquittal. *State* v. *Jack*, 58 Atl. Rep. 833 (Del., Gen. Sess.).

Two states are thus added to the twenty-two jurisdictions which, with England, treat insanity as an affirmative defense. *State* v. *Lawrence*, 57 Me. 574. Opposed are the United States Supreme Court and eleven state courts, holding that, the sanity of the accused being an essential element of criminality, the prosecution must establish it beyond a reasonable doubt. *Davis* v. *United States*, 160 U. S. 469. Delaware, seemingly, takes the latter view. *State* v. *Reidell*, 9 Houst. (Del.) 470; but see *State* v. *Danby*, 1 Houst. Cr. Rep. (Del.) 166, 174. The majority view discloses, apparently, a misconception regarding the probative force of the presumption of sanity. THAYER, PRELIM. TREAT. EV. 383. Again, the issue is sometimes confused by statutes requiring the jury, if it acquit because of insanity, so to find by special verdict, apparently compelling the defendant to justify such verdict by proving his insanity. See *State* v. *Quigley*, *supra*. This would seem to abridge the right to trial by jury guaranteed by state constitutions, in denying the right of a jury to find a general verdict. *Underwood* v. *People*, 32 Mich. 1. Nor yet does the popular feeling, shared by courts, that guilty persons are likely to escape through easily feigned insanity, warrant the abrogation of the fundamental rule that no accused person shall be punished if there be a reasonable doubt of his guilt. *Cf. State* v. *Clark*, *supra*.

DAMAGES — EXCESSIVE DAMAGES — REMITTITUR BY APPELLATE COURT. — In an action of tort for personal injuries the only error assigned on appeal was that the verdict was so excessive as to evince passion, prejudice, and caprice. *Held*, that the judgment will be reversed unless the plaintiff remit the amount found by the appellate court to be excess. *Alabama, etc., R. R. Co.* v. *Roberts*, 82 S. W. Rep. 314 (Tenn.).

This case settles a point heretofore doubtful in Tennessee. *Cf. Vaulx* v. *Herman*, 8 Lea (Tenn.) 683. It is generally held that, even in cases of tort, the right of an

appellate court to require *remittitur* of excessive damages as a condition to affirming judgment does not encroach upon the constitutional right to trial by jury, and this view would seem to be correct. It is also arguable that such an excess as indicates prejudice or passion on the part of the jury cannot be remitted and the balance affirmed, since the whole verdict is tainted by improper motive. *Stafford* v. *Pawtucket Hair-Cloth Co.*, 2 Cliff. (U. S. C. C. 1st cir.) 82; *Murray* v. *Leonard*, 11 S. Dak. 22. But it would seem that if the evidence plainly warrants some recovery, to that extent, at least, the verdict has not been affected by prejudice; and the appellate court may properly fix upon such an amount as, under the same evidence, it would not disturb upon review. *Collins* v. *Albany, etc., R. R. Co.*, 12 Barb. (N. Y.) 492; *Lombard* v. *C., R. I. & P. R. R. Co.*, 47 Ia. 494. The practice followed by the principal case also tends to prevent multiplicity of actions and to discourage recoveries based upon defendants' ability to pay, rather than upon plaintiffs' damage.

DAMAGES — MEASURE OF DAMAGES — IMPROVEMENTS TO CONVERTED PROPERTY. — The defendant, acting under a *bona fide* belief that he had acquired title, cut timber on the plaintiff's land, and manufactured the logs into pulp. The plaintiff brought trover. *Held*, that the measure of damages is the stumpage value of the trees at the time they were cut. *Trustees of Dartmouth College* v. *International Paper Co.*, 132 Fed. Rep. 92 (Circ. Ct., Dist. of N. H.). See NOTES, p. 305.

EASEMENTS — ACQUISITION BY PRESCRIPTION — BEGINNING OF PRESCRIPTIVE PERIOD. — The plaintiff had a way of necessity over the defendant's land, and continued to use it after the necessity ceased. *Held*, that such user did not become adverse until the defendant had notice of the hostile claim. *Ann Arbor, etc., Co.* v. *Ann Arbor, etc., R. R. Co.*, 99 N. W. Rep. 869 (Mich.).

The contention that user of a way of necessity is always adverse would, if correct, result in a contrary decision, since the right ceases with the necessity. *Cf. Plitt* v. *Cox*, 43 Pa. St. 486; *Viall* v. *Carpenter*, 14 Gray (Mass.) 126. The court properly rejected this argument, since the basis of such an easement is an implied grant. *Tracy* v. *Atherton*, 35 Vt. 52. The decision proceeds on the ground that a licensee's user does not become adverse until the landowner knows of his hostile claim. *Taylor* v. *Gerrish*, 59 N. H. 569. This is because the owner is justified in supposing, until contradicted, that the user is under the continuing license. But in the principal case the plaintiff's rights ceased at once by operation of law, and the subsequent user was both hostile and notorious. No other recognized element being absent, the user must be considered adverse. This result seems somewhat harsh, since an owner apparently safe in permitting a way of necessity may suffer a curtailment of his rights by the mere opening of an unknown road on another's property. The requirement would not be unreasonable, that, to be adverse, the user must not only be notorious and hostile, but that its hostility be notorious as well.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — LAND ALREADY OCCUPIED FOR RAILROAD PURPOSES. — A railroad company owned two strips of land between its own right of way and the parallel roadway of another company. It was shown that the strips were not necessary for the owner's business, nor likely to be so. *Held*, that the second company may condemn a portion of each tract, in widening its right of way. *Chicago, etc., Electric R. R. Co.* v. *Chicago, etc., Ry. Co.*, 71 N. E. Rep. 1017 (Ill.).

The power to condemn any property devoted to public uses must be expressed or very clearly implied in the legislative enactment authorizing appropriation. *In re City of Buffalo*, 68 N. Y. 167. Thus, a railroad's general statutory power of condemnation does not ordinarily include the right to appropriate land already occupied by another railroad. *Housatonic, etc., R. R. Co.* v. *Lee, etc., R. R. Co.*, 118 Mass. 391. But, as the present case holds, this exception does not apply where the property is not in use and not necessary for the purposes of the railroad owning it. *In re Rochester, etc., R. R. Co.*, 110 N. Y. 119. In an earlier Illinois case the same statute was held not to authorize condemnation longitudinally of another road's right of way. *Illinois, etc., R. R. Co.* v. *Chicago, etc., R. R. Co.*, 122 Ill. 473. The present case distinguishes this on the ground that no right of way is involved in the later case. There is, however, no reason why the doctrine of the principal case might not apply with equal force to an unused strip of a right of way. *Cf. New York, etc., R. R. Co.* v. *Forty-Second Street, etc., R. R. Co.*, 26 How. Pr. (N. Y.) 68. If the cases are to be reconciled, it must be on the ground that in the earlier case it did not appear that the part of the right of way involved was unused.

EQUITABLE ELECTION — APPLICATION OF THE DOCTRINE WHERE THE LEGATEE IS GIVEN PROPERTY TO WHICH HE IS BY LAW ENTITLED. — A testator bequeathed all his personal property to his wife, and devised certain real estate, which, in fact, was her separate property, to her for life, remainder to his son. His widow proved the will, and retained all the personalty, valued at one hundred dollars. By the code she was entitled to three hundred dollars worth of her husband's personalty. The plaintiff, her executor, petitioned to sell the real estate. *Held*, that he is barred by the election of his testatrix. *Tripp* v. *Nobles*, 48 S. E. Rep. 675 (N. C.). See NOTES, p. 302.

ESTOPPEL — ESTOPPEL IN PAIS — RIGHTS OF ASSIGNEE OF ESTOPPEL-ASSERTER. *Semble*, that where an innocent holder of municipal bonds good only on the ground of estoppel, sells them to a purchaser having full knowledge of the facts, any recovery by the latter in a suit on the bonds is limited to the amount he has paid for them. *Gamble* v. *Rural Independent School District*, 132 Fed. Rep. 514 (Circ. Ct., N. D. Ia.). See NOTES, p. 302.

FEDERAL COURTS — JURISDICTION — THE UNITED STATES A PARTY. — A federal statute required every contractor for public works to execute a bond to the United States conditioned upon performance of the contract and upon payment of persons supplying materials, and further provided that any one supplying materials might sue on this bond to his own use in the name of the United States. A materialman brought an action under this statute. *Held*, that since the United States is a real party, the federal courts have jurisdiction. *United States* v. *Churchyard*, 132 Fed. Rep. 82 (Circ. Ct., Dist. of R. I.).

The court decided that through its assumption of a public duty to protect materialmen, the position of the United States as a party was analogous to its position in those cases which hold that though entirely without pecuniary interest, the United States, because of its public obligation to protect patents, may maintain a bill to set aside a patent obtained by fraud. *United States* v. *Bell Telephone Co.*, 167 U. S. 224. But in the patent cases the United States is the real party suing, often undertaking the suit on its own initiative, for the benefit of no particular person. *United States* v. *Bell Telephone Co.*, 128 U. S. 315. And if the suit be solely for the benefit of a third person, jurisdiction will be refused. See *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273. In the principal case the United States is not really suing; it possesses no initiative, and the suit is always for the benefit of a third party. Therefore, since the federal courts assume jurisdiction on the basis of the real, rather than the nominal parties to an action, two other decisions in which jurisdiction was denied seem to have reached the better result. *United States* v. *Henderlong*, 102 Fed. Rep. 2; *United States* v. *Sheridan*, 119 Fed. Rep. 236.

HIGHWAYS — ESTABLISHMENT — USE UNDER A MISTAKE AS THE BASIS OF A PRESCRIPTIVE RIGHT. — Through a mistake in location a highway was for some distance laid out fifty-seven feet south of a section line along which it was authorized to run, and was maintained and used for more than twenty years. *Held*, that a right of way by prescription has not been created. *Shanline* v. *Wiltsie*, 78 Pac. Rep. 436 (Kan.).

Upon the question whether possession under a mistake constitutes adverse user the authorities are not altogether in accord. It may be granted that one who holds property provisionally, clearly intending to claim only his own, gains no title, since his possession and claim of right do not correspond. See *Grim* v. *Murphy*, 110 Ill. 271. But when a party, though under a mistake, lays claim to land and uses it as his own, the requirements of a prescriptive right would seem to be fulfilled, as well as if he knew the land belonged to another. *Bales* v. *Pidgeon*, 129 Ind. 548; see *Moore* v. *Wiley*, 44 Kan. 736. The present case appears to come within the latter principle. *Landers* v. *Town of Whitefield*, 154 Ill. 630. Several cases of the sort, however, agree with the court that while the public use the actual way, their claim is only to a way along the true line — a somewhat difficult conception — or go upon the broad ground that possession under a mistake is not adverse. *State* v. *Welpton*, 34 Ia. 144.

HIGHWAYS — INJURIES FROM OBSTRUCTIONS — LIABILITY OF STREET RAILWAY. — The operatives of the defendant's car, finding an obstruction which had been unlawfully placed upon the track, moved it a sufficient distance to allow the car to pass. Shortly afterwards the plaintiff was injured by riding into it in the darkness. *Held*, that the defendant owed no duty to the plaintiff to remove the obstruction from the highway. *Howard* v. *Union Ry. Co.*, 57 Atl. Rep. 867 (R. I.). See NOTES, p. 303.

INDIANS — POWER OF GOVERNMENT AGENT TO COLLECT TAX LEVIED BY INDIAN TRIBE. — Acts of Congress and a treaty denied to an Indian tribe any jurisdic-

tion over white persons and their property, but provided that white persons not authorized by the Indians to remain should be considered intruders, who might be removed by government agents unless they were in possession of town lots. Upon refusal of the plaintiffs, who owned such lots, to pay a trading-license imposed by the Indian tribe, the defendant, a government agent, closed their place of business. *Held*, that the defendant's action will not be enjoined. *Buster & Jones* v. *Wright*, 82 S. W. Rep. 855 (Ind. T.).

The defendant's action can hardly be supported as a legal collection of a tax, since the tribe had jurisdiction over neither the persons nor the property taxed. *The New York Indians*, 5 Wall. (U. S.) 761. Furthermore, although the treaty expressly gave the Indians the right to designate who should reside in their territory, and although they withheld permission from the plaintiffs because of their failure to pay the trading license, there seems on the face of the statute no way of enforcing the treaty provisions against the plaintiffs, since the remedy provided by removal could not be used against a town resident. But the Indian agent had power to regulate intercourse with the Indians. In closing the plaintiffs' place of business, then, he was not acting as a collector of taxes, but was making a reasonable use of his powers, as such agent, to enforce the treaty. And this he should be allowed to do by any means not expressly prohibited by statute.

INTERPLEADER — EFFECT OF PRIOR DECREE IN FAVOR OF ONE DEFENDANT. — The plaintiff's creditor made two assignments of his claim. The plaintiff then brought a bill of interpleader against the first assignee and a judgment creditor of the second assignee, who had obtained a decree requiring the plaintiff to pay him the amount of the claim after both had learned of the first assignment. *Held*, that the bill will lie, since the plaintiff's laches did not mislead the claimant who obtained the decree. *City of New York* v. *Cody*, 44 N. Y. Misc. 270.

An interpleader must ordinarily be sought before either claimant has obtained a judgment, since otherwise the petitioner would have two opportunities to litigate one of the claims against him. *Holmes* v. *Clark*, 46 Vt. 22. No previous case has been found in which an interpleader was sought after a decree in equity, but as an interpleader after decree would give the plaintiff the same unfair advantage as after judgment, it is submitted that the same rule should apply in both cases. In a few instances where the plaintiff has an excuse for not having brought his bill sooner, this general rule does not apply. *Lozier's Executors* v. *Van Saun's Administrators*, 3 N. J. Eq. 325; *Cannon* v. *Kinney*, 1 Smed. & M. Ch. (Miss.) 555. But after judgment or decree, he is *prima facie* guilty of delay, and ought not to be allowed to file a bill without satisfactorily explaining his failure to file it before. *Cf. Cornish* v. *Tanner*, 1 Y. & J. 333. The plaintiff in the principal case knew of the first claim before his liability became fixed by the decree, and in allowing him to bring his bill after that time the decision seems to be making a questionable exception to the general rule.

JUDGMENTS — FOREIGN — DECREE OF ADOPTION OBTAINED BY FRAUD. — In an action in the state of Washington to quiet title, the case turned on whether the defendant was the adopted child of the plaintiff. The latter declared that, by the law of Iowa, where it purported to have taken place, the adoption was void, because induced by false representations that the defendant's natural mother was dead. *Held*, that a demurrer to the declaration must be sustained. *James* v. *James*, 35 Wash. 655.

In Iowa, adoption is accomplished by filing, in the office of the county recorder, an instrument signed by the adoptive, and, with some exceptions, the natural parents of the child. Code of Iowa, 1897, §§ 3251, 3252. This law not having been properly set forth in the declaration, the court assumed that Iowa law was the same as that of Washington, under which adoption is by decree of the Superior Court. Such a decree is held to take effect *in rem* upon the child, and is valid in other jurisdictions. *Van Maitre* v. *Sankey*, 148 Ill. 536. The Supreme Court of Washington might possibly, on appeal, reverse a decree of adoption by the Superior Court on the ground that fraud had been practised in obtaining it. See *Booth* v. *Van Allen*, 7 Phila. (Pa.) 401. But granting the power of an Iowa court to consummate adoptions of extra-territorial validity, and assuming a formal decree by such a court, the Washington tribunal could hardly disregard it on the ground that facts had been suppressed, when it was secured; although the Iowa Supreme Court, according to Washington law, might have done so.

JUDGMENTS — WHAT CONSTITUTES — DECREE OF FORECLOSURE. — The Kansas civil code provides that, unless execution be sued out within five years from the date of any judgment, the judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor. *Held*, that a decree of sale of real estate

under foreclosure proceedings is a judgment within the meaning of the section. *Killen* v. *Nebraska, etc., Co.*, 78 Pac. Rep. 159 (Kan.).

The principal case overrules a very recent Kansas case, which in its turn had overruled a still earlier one, decided in 1870. *Cf. Watson* v. *Keystone Ironworks Co.*, 74 Pac. Rep. 269; *The State* v. *McArthur*, 5 Kan. 280. Section 10 of the Kansas code abolishes the distinction between actions at law and suits in equity, and section 395 defines a judgment as "the final determination of the rights of the parties in an action." These sections would appear to be conclusive of the matter, and in other code states similar provisions are so taken. *Stout* v. *Macy*, 22 Cal. 647. The opposite construction depends on the authority of an Ohio case. *Cf. Beaumont* v. *Herrick*, 24 Oh. St. 445. This case, however, may be explained on the ground that the Ohio code provided no execution applicable to a foreclosure decree. The Kansas statute provides, to be sure, for the extinguishment of the judgment lien as well as for the dormancy of the judgment; and it might be argued that, since a foreclosure decree confers no lien, such a decree does not fall within the statute. See *Butt* v. *Maddox*, 7 Ga. 495. The more liberal construction seems, however, fully justified on a fair interpretation of the various sections.

LANDLORD AND TENANT — REPAIR AND USE OF PREMISES — DUTY TO WARN TENANT OF HIDDEN DANGERS. — A landlord leased part of a building to the plaintiff. Before the time fixed for entry he discovered hidden defects in parts of the building not leased to the plaintiff which made the building unsafe, but said nothing to the tenant, who entered. Soon after, the municipal authorities compelled the landlord to demolish the building, and the tenant sued him for damage to his goods and fixtures caused by the enforced removal. *Held*, that the tenant may recover, as the damage was the natural consequence of the maintenance of a public nuisance by the landlord. *Steefel* v. *Rothschild*, 179 N. Y. 273.

A man is liable for the natural and proximate consequences of his acts, and the causal connection is not broken by the rightful act of a third person, if such act was probable. *Harrison* v. *Berkley*, 1 Strobh. (S. C.) 525; *Radway* v. *Briggs*, 37 N. Y. 256. As the enforced abatement of a public nuisance is a probable consequence of committing it, the damages here were the proximate result of the landlord's illegal act. It follows that, since a private individual may recover for particular damage, direct or consequential, caused by the existence of a public nuisance, the decision of the court is sound. See *Lansing* v. *Smith*, 4 Wend. (N. Y.) 9, 25. It might be put on a broader ground, however. The tenant of a part of premises may move out and need pay no subsequent rent if a defect is discovered in a portion not under his control, which renders his portion unfit for occupancy. *Sully* v. *Schmitt*, 147 N. Y. 248. It would seem, therefore, that the landlord's failure to disclose the hidden defects defrauded the tenant of his right not to enter, and would make him liable for damages naturally resulting. *Cf. Maywood* v. *Logan*, 78 Mich. 135.

LEGACIES AND DEVISES — VOID OR VOIDABLE — LEGACY UPON SECRET TRUST FOR WITNESS. — The testator willed his personal estate to the plaintiff under a secret, oral trust for five beneficiaries, among them a witness to the will. The English Wills Act annulled legacies and devises given by a will to witnesses thereof. *Held*, that the witness does not forfeit her right under the secret trust. *O'Brien* v. *Condon*, 38 Ir. L. T. 252 (Ir., Ch. D.).

A trust in favor of a witness would probably be void if expressed in the will. See *Holdfast* v. *Dowsing*, 2 Stra. 1253. The English law, in opposition to the principal case, has dealt in the same manner with a secret trust. *In re Fleetwood*, L. R. 15 Ch. D. 594, 609. The court here goes upon the ground that the interest of the witness is not, in the meaning of the statute, a legacy given by the will, but is even contrary to its express provisions. No American cases have been found upon this question. But it has been held that a charity which is the beneficiary of a secret trust does not take under the will so as to exempt the legacy from taxation. *Cullen* v. *Attorney-General*, L. R. 1 H. L. 190; see *Matter of Edson*, 38 N. Y. App. Div. 19. This reasoning seems technically correct, and is perhaps unobjectionable in its results. The statute aims only to deprive a witness of such interest in the testator's estate as would make him incompetent; and an interest not mentioned in the instrument, and of which the witness is ignorant, as here, could not affect his competency. Where the trust was known to the witness a different result might be reached.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE SAFE APPLIANCES — CONTRACTS LIMITING LIABILITY. — In his contract of service with an express company, the plaintiff, its employee, agreed to assume all risks of injury, whether occasioned by the negligence of the company or otherwise. The plaintiff was injured through the company's negligence in furnishing a defective appliance. *Held*, that he may recover,

as the contract is against public policy and void. *Johnson* v. *Fargo*, 90 N. Y. Supp. 725.

The law of New York upon this point has been doubtful. *Cf. Purdy* v. *Rome, etc., R. R. Co*, 125 N. Y. 209; *Shepard* v. *New York, etc., R. R. Co*, 18 N. Y. Supp. 665. An Ohio statute similar to the rule announced by the principal case has been held unconstitutional as impairing the right of freedom to contract. *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931. But although that right should be jealously safeguarded, in a case where it strongly contravenes the interest which the state has in the lives, health, or safety of its citizens, a statute to protect persons whose unequal position renders self-protection impossible would seem constitutional. See *Holden* v. *Hardy*, 169 U. S. 366. Contracts to waive the protection afforded by Employers' Liability Statutes against negligence of fellow-servants are enforced in England. *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357. In this country, however, they are held to be against public policy. *Lake Shore, etc., Ry. Co.* v. *Spangler*, 44 Oh. St. 471. Public interest would seem to condemn more strongly contracts which encourage the master's own negligence than those which limit his liability for negligence of co-employees. The principal case proceeds upon the same policy as these similar cases; is in harmony with the trend of modern legislation; and, in view of the necessities of present industrial conditions, its effect is salutary. The weight of authority is in accord. *Roesner* v. *Hermann*, 8 Fed. Rep. 782.

NEW TRIAL — GROUNDS FOR GRANTING — IMPROPER CONDUCT OF COUNSEL. — In a suit for personal damages by the defendant's employee, the plaintiff's counsel, after being allowed to show that the defendant was insured against liability, asked him if the insurance company would pay his lawyers. This question was not allowed. *Held*, that the defendant is entitled to a new trial. *Iverson* v. *McDonnell*, 78 Pac. Rep. 202 (Wash.).

One of the grounds of the decision is that it is reversible error to ask a question as to the defendant's liability insurance, even though the objection to the question is sustained. It is true that if a defendant is insured, evidence of that fact should not be admitted. *Sawyer* v. *Arnold Shoe Co.*, 90 Me. 369. If, after objection, the plaintiff's lawyer is allowed to state the fact to a juror, it is reversible error. *George A. Fuller Co.* v. *Darragh*, 101 Ill. App. 664. And there will be a reversal of the plaintiff's judgment if his counsel persists in asking questions to bring forth such fact when the court has sustained an objection to similar questions. *Manigold* v. *Black River Traction Co.*, 80 N. Y. Supp. 861. But the argument that a judgment should be reversed because the jurors have by inference learned of a fact which they should not know when there has been neither wrong ruling by the court in reference thereto nor misconduct of counsel or jury, is believed to go far beyond present authority.

SALES — RIGHTS AND REMEDIES OF BUYERS AND SELLERS — SPECIFIC PERFORMANCE AT LAW. — A purchaser refused an article manufactured on his order. *Held*, that the vendor may, at his election, retain the property for the purchaser, and recover the contract price as the measure of his damages. *Kinkead* v. *Lynch*, 132 Fed. Rep. 692 (Circ. Ct., Dist. of Nev.). See NOTES, p. 298.

TITLE, OWNERSHIP, AND POSSESSION — FINDING LOST GOODS — LAND OWNER'S RIGHT TO CHATTELS FOUND ON HIS LAND. — The lessee of land found a quantity of gold-bearing quartz buried in the soil in a sack. *Held*, that it belongs to the owner of the land and not to the finder. *Ferguson* v. *Ray*, 77 Pac. Rep. 600 (Ore.).

The rule that the finder of lost property keeps it as against everybody but the true owner was based on the reason that in order to defeat the finder's possession the claimant must show a prior possession or title. *Bridges* v. *Hawkesworth*, 21 L. J. 75. Without considering at length any doctrine of possession, the American courts, following authority, have generally held that the finder keeps the property no matter where it is found. *Durfee* v. *Jones*, 11 R. I. 588; *Hamaker* v. *Blanchard*, 90 Pa. St. 377. A late decision in Oregon, apparently overruled by the principal case, is to that effect. *Danielson* v. *Roberts*, 74 Pac. Rep. 913 (Ore.); see 17 HARV. L. REV. 425. The English courts hold that control of a chattel, though its existence be unknown, coupled with an intent to exclude others from unauthorized interference, constitutes possession. Upon that theory they give articles found in private land to the owner thereof, as a possessor prior to the finder. *Elwes* v. *Brigg Gas Co.*, L. R. 33 Ch. D. 562; *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. The present case follows these English decisions. If the intent necessary for possession be a positive intent to exercise the control for one's self, the American cases are right, for the finder is, in general, the first party succeeding the loser to have that intent.

TORTS — LIABILITY OF MAKER OR VENDOR OF CHATTEL TO THIRD PERSONS INJURED BY ITS USE. — The defendant contracted to keep in repair the vans of a mineral water company. This he did so negligently that a van broke, injuring its driver, who brought suit against him in tort. *Held*, that the plaintiff may not recover, as the defendant owes him no duty of care. *Earl* v. *Lubbock*, 21 T. L. R. 71 (Eng., C. A.).

For a discussion of the principles involved, see 6 HARV. L. REV. 261.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — PERSONAL NAMES. — The plaintiff had for years been selling in bottles a cement known as "Van Stan's Stratena Cement." The defendant, Van Stan, in a neighboring place of business, sold cement in similar bottles labelled "Van Stan's Cement," with intent to trade and thereby trading on the plaintiff's reputation. *Held*, that the defendant will be enjoined from using the name "Van Stan's Cement" in labelling and exposing his goods for sale. *Van Stan's Stratena Co.* v. *Van Stan*, 58 Atl. Rep. 1064 (Pa.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

TRUSTS — CESTUI'S INTEREST IN THE RES — APPORTIONMENT OF LOSS BETWEEN TENANT FOR LIFE AND REMAINDERMAN. — A fund, held in trust to pay the income to a *cestui* for life, was invested in a mortgage. The interest was irregularly paid, and ultimately the security was realized at a considerable loss. Upon a bill brought by the life tenant for arrears of interest, it became necessary, in apportioning the amount received, to determine whether payments made to him before the loss should be taken into consideration. *Held*, that the proceeds should be divided between principal and interest in the proportion that the original fund bears to the arrears of interest, without reference to any sums received by the *cestui* for life. *In re Atkinson*, 53 W. R. 7 (Eng., Ch. D.).

On the question here raised, the American courts agree with the present decision. *Hagan* v. *Platt*, 48 N. J. Eq. 206; *Parsons* v. *Winslow*, 16 Mass. 361. The English authorities, however, are in conflict. One line of decisions holds that such payments should be added to the net proceeds, and this total sum divided between the two estates in proportion to what each would have received, had there been no loss. *In re Foster*, 45 Ch. D. 629. Other decisions uphold the principal case. *In re Moore*, 54 L. J. Ch. 432. The defect of the former rule is that a life tenant, having rightfully received payments, might by that method of apportionment get nothing, or even be required to refund; but it is clear that such payments, being made in accordance with the trust, cannot be recovered. Logic certainly is with the contrary position, that the loss ought to affect only such claims as are still unsettled at the date thereof. The rule of *In re Foster* should be applied only where the loss occurs after a breach of trust, when it becomes necessary to place the parties as nearly as possible in the position occupied at the time of the default. *Cf. In re Bird*, [1901] 1 Ch. 916.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE DOCTRINE OF STARE DECISIS. — The appalling multiplication of our law reports has furnished the text for much discussion of a situation of universally admitted gravity. The latest deliverance on the subject is of an ultra-pessimistic tinge. In a recent number of the Michigan Law Review Mr. Edward B. Whitney comes out squarely with the prophecy that "within the lifetime of men already admitted to the bar" the doctrine of *stare decisis* will have been avowedly abolished, and the Continental method of treatment of judicial decisions substituted therefor. *The Doctrine of Stare Decisis*, by Edward B. Whitney, 3 Mich. L. Rev. 89[1] (Dec., 1904).

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[1] A paper read at the section of Private Law of the Congress of Arts and Science, at St. Louis, September, 1904.